IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-1893

Janice McLean Bireline,

Petitioner,

v.

Dr. L. W. Seagondollar, et al.,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

Thomas L. Barringer

Barringer and Howard
305 First Federal Bldg.
P. O. Box 2334
Raleigh, N. C., 27602
Telephone: 919-833-2983

Counsel for Petitioner

Norman B. Smith
Smith, Patterson, Follin,
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401
Telephone: 919-274-2992

Counsel for Petitioner

40

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term

No. _____

Janice McLean Bireline,

Petitioner,

v.

Dr. L. W. Seagondollar, et al.,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

The Petitioner, on behalf of herself and others similarly situated, respectfully petitions the Court for a writ of certiorari to review the judgment and opinion entered on December 12, 1977, in this proceeding by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit, rendered on December 12, 1977, is published. It is reprinted as Appendix A to this Petition. (pp. 10-17, infra). Petitioner petitioned for rehearing en banc was denied by the Court of Appeals on January 24, 1978. The memorandum opinion of the United States District Court for the Eastern District of North Carolina is unpublished. It is reprinted as Appendix B to this Petition. (pp. 18-20, infra).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. When do a Plaintiff's causes of action under 42 U.S.C. §1983 accrue for the purposes of the running of the applicable statute of limitations?

II. Is the running of the applicable statute of limitations for causes of action under 42 U.S.C. §1983 tolled for a state university faculty member while he or she is seeking to exhaust institutional remedies within the university prior to termination of his or her employment?

III. Is an action filed under 42 U.S.C. §1983 an action upon a liability created by statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is an action under 42 U.S.C. §1983 in which Plaintiff has alleged at least eleven separate causes of action against Defendants for depriving her of her due process and equal protection rights under the Fourteenth Amendment. She has alleged that Defendants' acting under color of law deprived her of both an interest in property and in liberty without due process of law and that they deprived her of her equal protection rights by discriminating against her because of her sex in regard to nine (9) separate areas continuing until her employment was terminated on June 30, 1971.

Plaintiff's complaint was filed on June 29, 1973, within two (2) years after her employment at N.C. State University terminated on June 30, 1971.

Plaintiff, a female, was first employed as a non-tenured instructor in physics at North Carolina State University during the 1962-63 academic year. She continued as an instructor each academic year thereafter on a year-to-year contract until June 30, 1971, the end of the 1970-71 academic year, when her employment was terminated.

In May, 1970, she received a letter from Defendant Caldwell notifying her that she was being reappointed for a one year term as an Instructor of Physics effective August 24, 1970, but that this was a terminating employment of one year and that she would not be reappointed beyond the end of the 1970-71 academic year. Following receipt of this letter, she asked Defendants Menius, Seagondollar and Caldwell to reconsider their decisions to terminate her employment which they agreed to do and she was not notified of their final decision to terminate her employment until she received letters from Defendant Seagondollar dated December 21, 1970; from Defendant Menius dated December 3, 1970; and from Defendant Caldwell dated October 25, 1971. She thereafter appealed the decision to terminate her employment to the President and Board of Trustees of the University of North Carolina.

In the meantime Plaintiff had sought to exhaust her institutional

remedies by appealing to the Faculty Grievance and Hearing Committees. The Hearing Committee rendered its final decision on or about July 15, 1971, and the Grievance Committee rendered its decision on or about October 14, 1971.

On February 3, 1975, almost a year and a half or eighteen (18) months after plaintiff's complaint was filed, Defendants filed a motion to be allowed to amend their answer to plead the affirmative defense that Plaintiff's cause of action was barred by the statute of limitations. Almost one year and a half or seventeen (17) months after Defendants' motion to amend their answer was filed, it was granted in an order entered by a Magistrate on August 11, 1976.

The District Court in an order entered on August 24, 1976, affirmed the decision allowing Defendants' motion to amend their answer to allege the statute of limitation and further granted defendants' motion for summary judgment on the ground that all of plaintiff's causes of action were barred by the statute of limitations. The United States Court of Appeals for the Fourth Circuit in an order entered on December 12, 1977 affirmed the decisions of the District Court.

In apt time Plaintiff petitioned for a rehearing and this petition was denied on January 24, 1978.

REASONS FOR GRANTING THE WRIT

The Supreme Court does not appear to have yet faced squarely the question of when plaintiffs' causes of action for deprivation of constitutional rights under color of law under 42 U.S.C. §1983 accrue. It has decided questions of whether various civil rights causes of action are independent of each other for purposes of tolling applicable limitations periods, but not with the questions of when the causes of action accrue. See Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Although citizens now know that their civil rights causes of action are independent of each other, they also need to know when these causes of action accrue so that they can know when the applicable statutes of limitation begin to run.

The Court has also not yet decided the question of whether the running of the applicable limitation period for causes of action under 42 U.S.C. §1983 should be tolled while a state university faculty member is seeking to exhaust remedies within that institution prior to

the date of termination of employment.

The Court has also not yet given citizens very much guidance as to the nature of causes of action under 42 U.S.C. §1983 so that they may know what the applicable limitation period within their state is. In the present case, the District Court and Court of Appeals ruled that the applicable North Carolina statute of limitation was N.C.G.S. §1-52(2) which provides an action ". . . [u]pon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it . . ." must be commenced within three (3) years. Plaintiff contends that causes of action under 42 U.S.C. §1983 are not causes of action upon liabilities created by statute but rather upon liabilities created by the Constitution of the United States.

CONCLUSION

These are all questions of obvious national importance fully warranting review and resolution by the Supreme Court. For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Fourth

Circuit in this proceeding.

Respectfully submitted,

Thomas L. Barringer
Barringer And Howard
305 First Federal Bldg.
P. O. Box 2334
Raleigh, N. C., 27602
Telephone: 919-833-2983

Counsel for Petitioner*

*The prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2255

Janice McLean Bireline,

Appellant,

-versus-

Dr. L. W. Seagondollar, Chairman, Department of Physics, North Carolina State University and Dr. A. C. Menius, Jr., Dean, School of Physical Sciences and Applied Mathematics, North Carolina State University and John T. Caldwell, Chancellor of N.C. State University,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. J. Braxton Craven, Jr., Circuit Judge.*

Argued: April 7, 1977.

Decided: December 12, 1977

Before CLARK, Associate Justice,** HAYNSWORTH, Chief Judge, and RUSSELL, Circuit Judge.

Thomas L. Barringer (Barringer and Howard on brief) for Appellant; Jack Cozort, Associate Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

---

*Sitting by Designation.

**Sitting by Designation. Justice Clark died before the preparation of this opinion.

RUSSELL, CIRCUIT JUDGE:

This is a §1983 action for both injunctive relief and damages. It was filed by the plaintiff claiming that the notice of termination of her employment as an instructor in physics by the North Carolina State University on May 19, 1970, was violative of her rights under the United States Constitution and laws. The defendants are the administrative and academic

officials of the University. After allowing the defendants to amend their answer by asserting the statue of limitations in bar of the action, the district court granted the defendants' motion for summary judgment on the ground that the action was barred by the appropriate statue of limitations. From such judgment the plaintiff has appealed. We affirm.

The circumstances giving rise to the action are as follows: In 1962 the plaintiff received an appointment as an instructor in the physics department of the University. During her third year of employment at the University, she was notified on June 16, 1965 by Chancellor John T. Caldwell that she would not be promoted to assistant professor, a tenure position, but could continue at the University only on a year-to-year basis. On May 19, 1970, Chancellor Caldwell notified her that she would receive a terminal contract with the University after the expiration of that academic year. Upon receiving this notice of non-renewal, she requested the defendants to reconsider their decision to terminate her employment. The defendants in a letter dated December 21, 1970 informed her that they had reconsidered their decision but had not changed their decision to terminate her employment. She then filed an administrative appeal of such termination. On October 25, 1971, she was informed of the defendants' acceptance of the majority

report of the Grievance Committee recommending that the decision to terminate her employment be affirmed.

This action was filed on June 29, 1973, alleging that the termination of plaintiff's employment was the result of a policy of sex discrimination in compensation, terms, conditions, privileges and tenure of employment at the University. She filed two motions to amend her complaint to enlarge her cause of action. The last of such motions was filed on January 23, 1975. The Court allowed the amendments by order dated January 15, 1976. The defendants on February 3, 1975, in turn moved to amend their answer in order to allege the North Carolina three-year statute of limitations as a defense to the action. The amendment to the answer was allowed by the Court. The District Court thereupon proceeded to consider the defendants' motion for summary judgment on the basis of the plea of the statute of limitations. It found as a fact that the plaintiff's cause of action accrued on or before May 19, 1970, and applying what it conceived to be the applicable statute of limitations, granted the motion for summary judgment and dismissed the complaint.

There are three issues primarily raised by the plaintiff on her appeal:

(1) Did the Court err in allowing

the defendants to amend their answer to allege the statute of limitations as a bar to plaintiff's cause of action?

(2) Was North Carolina General Statutes §1-52(2) the applicable statute of limitations for actions filed under 42 U.S.C. §1983 in a federal district court sitting in North Carolina?

(3) If the applicable period of limitations for filing actions under 42 U.S.C. §1983 is three years, were there any genuine issues of material facts in regard to whether each of the causes of action alleged in the complaint accrued prior to June 29, 1970?

We shall consider seriatim these several issues.

I

The first issue is controlled by the decision of Foman v. Davis, (1962) 371 U.S. 178, 182. In that case the Court declared that in keeping with the language of Rule 15(a), F.R.C.P. leave to amend should be "freely given" in the absence of "undue delay, bad faith or dilatory motive on the part of the movant." The grant or denial of such leave was stated to be "within the discretion of the District Court." The exercise of such discretion can only be reversed for clear error. We find no

clear error in the district court's allowance of defendants' motion to amend their answer to assert the applicable statute of limitations.

II

There is no federal statute of limitations applicable to suits arising under §1983. Under those circumstances, it is the rule that the applicable "provision limiting the time in which an action [under §1983] must be brought, must be borrowed from the analogous state statute of limitations," which in §1983 actions brought in North Carolina, has been found to be the three-year limitation established by §1-52(2), 1A General Statutes of North Carolina, for actions founded on "a liability created by statute." Cox v. Stanton, (4th Cir. 1975) 529 F.2d 47, 49. The plaintiff suggests, however, that in Cox the parties had agreed that the three-year limitation was applicable and the Court merely accepted the parties' construction without actually deciding for itself what was the "analogous statute of limitations." In her view, her action is not upon "a liability created by statute," controlled by a three-year limitation under the North Carolina statutes, but upon the Federal Constitution itself, in which case the effective limitation statute would be the "catch-all" provision in the North Carolina limitation statutes. §1-56, 1A General Statutes of North Carolina. We do not

agree. The plaintiff's action only exists by virtue of §1983. That statute is the source of her right of action, and it is accordingly proper to apply the limitation fixed for actions based upon "a liability created by statute" to actions brought under §1983 within North Carolina, as the Court did in Cox.

III

Assuming that the three-year limitation is applicable, the final question turns on a determination of when plaintiff's right of action accrued. While the time limitation itself is borrowed from state law, the federal rule fixes the time of accrual of a right of action. Cox, supra, at p. 50. This federal rule establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action. Young v. Clinchfield Railroad Company, (4th Cir. 1961) 288 F.2d 499, 503.

In this case the district judge found:

> "On May 19, 1970, the Plaintiff was given a termination notice by Chancellor Caldwell and that notice was intended to be and was in fact a final notice of termination of employment. On or about May 19, 1970, I find as a fact that plaintiff's cause of action accrued and that she could have at anytime thereafter

> sued the officials of the University of North Carolina at Raleigh with regard to the termination of her employment, and that she failed to do so until June 29, 1973, which is more than three years after the accrual of her cause of action."

It was on the basis of that finding of fact that the district court granted summary judgment and dismissed the action. We find no error in such ruling. While plaintiff was granted an administrative hearing after May 19, 1970, and it may have been appropriate for her to have delayed filing her complaint until after its conclusion, the pendency of the administrative reconsideration did not extinguish her legal right to proceed in court or suspend it. The fact that she was unsuccessful in the administrative reconsideration did not create a new cause of action; it only made it apparent that if she were to obtain relief it could only come as a result of a successful law suit commenced within three years following May 19, 1970.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL NO. 4348

JANICE McLEAN BIRELINE, Plaintiff,	O R D E R
-v-	ON VARIOUS MOTIONS
DR. L. W. SEAGONDOLLAR, Chairman, Department of Physics, North Carolina State University, et al., Defendants.	AND ON MOTION FOR MOTION FOR SUMMARY JUDGMENT

The above-captioned matter came on for hearing in the United States District Court in Wilmington on Friday, August 13, 1976, and having been heard the following orders are entered:

Upon motion of the Plainitff, the Chancellor of the University of North Carolina at Raleigh, Mr. Caldwell, is joined as a party Defendant. The motions of the Plaintiff to join the Board of Governors of the University of North Carolina at Raleigh, the Board of Trustees of the University of North Carolina and President Friday are denied.

The order of the United States Magistrate filed August 11, 1976, allowing Defendants' motion filed February 3, 1975, for leave to amend their answer to plead the North Carolina three-year statute of limitations is affirmed, and the Court in its discretion allows the amendment to plead the three-year statute of limitations.

On motion for summary judgment, it appears to the Court from the statements of counsel, the pleadings and affidavits filed, that these facts are indisputed:

Plaintiff was advised as early as June 16, 1965, that she would not be promoted from instructor to associate professorship which had effect under the rules of the University of meaning that she would not become eligible for tenure, and would instead be employed from year to year. On May 19, 1970, the Plaintiff was given a termination notice by Chancellor Caldwell and that notice was intended to be and was in fact a final notice of termination of employment. On or about May 19, 1970, I find as a fact that Plaintiff's cause of action accrued and that she could have at anytime thereafter sued the officials of the University of North Carolina at Raleigh with regard to the termination of her employment, and that she failed to do so until June 29, 1973, which is more than three years after the accrual of her cause of action. After examining the statute of

limitations enacted by the Legislature of North Carolina, it is my opinion that a suit brought under 42 U.S.C. §1983 is a suit "upon a liability created by statute . . ." within the meaning of G.S. of N.C. 1-52. Since the Federal statute (1983) contains no statute of limitations, the pertinent statute of limitations applicable is that of the state in which the cause of action is brought. Although the period of limitations is State determined, accrual is a question of Federal Law. I conclude that the action accrued on or before May 19, 1970, and that further inquiries by Plaintiff and further consideration by the Chairman of the Department as to whether he would reopen the matter did not affect her right to sue as of May 19, 1970.

For the foregoing reasons, the motion for summary judgment will be, and it hereby is, GRANTED; and,

IT IS ORDERED, ADJUDGED AND DECREED that the Complaint be, and it is, DISMISSED.

This 13th day of August, 1976.

/s/ J. Braxton Craven, Jr.
UNITED STATES CIRCUIT JUDGE*

*Sitting by Designation